Supreme Court, U. S.
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No. 79-1862.

In the
Supreme Court of the United States.

OCTOBER TERM, 1980.

GLOBE NEWSPAPER COMPANY,
APPELLANT,

v.

THE SUPERIOR COURT FOR THE COUNTY OF NORFOLK,
APPELLEE.

ON APPEAL FROM THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS.

Motion to Dismiss.

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ON APPEAL FROM THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS.

Motion to Dismiss.

In accordance with the provisions of Rule 16 of the Supreme Court of the United States, the Superior Court for the County of Norfolk, Massachusetts (the Superior Court or the Appellee) moves the court to dismiss the present appeal from a judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts.

Statute Involved.

The Jurisdictional Statement accurately reproduces the statute involved at page 3.

Issues Presented.

1. Whether the controversy is moot.
2. Whether a state statute authorizing trial judges in their sound discretion to exclude the press and public from all or part of the criminal trial of a sexual offense against a minor victim, in order to preserve evidence required for a just conviction, violates the First Amendment right of the press to attend criminal trials.
3. Whether a state statute commanding trial judges to exclude the press and public from the criminal trial of a sexual offense during the testimony of a minor victim violates the First Amendment right of the press to attend criminal trials.

Statement of the Case.

An accurate statement of the case appears at pages 4-7 (statement of the Appellant Globe Newspaper Company [1]) and pages 25a-28a (opinion of the Massachusetts Supreme Judicial Court) of the Jurisdictional Statement.

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[1] The final three paragraphs of The Globe's "Statement of the Case", appearing at pages 7-8, are interpretation of the opinion of the Massachusetts Supreme Judicial Court.

Argument.

I. The Controversy is Moot. The Transient State of the Law During the Interim Between the Gannett and Richmond Decisions Renders the Present Case Incapable of Repetition.

The Appellant Globe Newspaper Company (the *Globe*) characterizes the present case as a dispute "capable of repetition, yet evading review" (1) because the challenged action (closure of an entire criminal trial to its reporters) was of too brief a duration to permit its litigation and (2) because it suffers the reasonable expectation of further similar treatment under the statute at issue (Jurisdictional Statement at 12-14). However several considerations converge against the conclusion that the present case will recur and that therefore it belongs within the traditional exception to mootness announced in *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission and Young*, 219 U.S. 498, 515 (1911), and applied in *Gannett Co., Inc.* v. *DePasquale*, 443 U.S. 368, 377 (1979).

First, the Supreme Judicial Court substantially constricted the operation of the statute in question. On its face Mass. G.L. c. 278, § 16A, appeared to bar the public and press from the entirety of the criminal trial of a sexual offense against a minor victim. However, by means of statutory interpretation strongly deferential toward possible First Amendment rights of the press and toward a traditional common law policy of open criminal trials, the court reasoned that the statute compelled closure of only that segment of a trial presenting the testimony of the minor victim and that it permitted closure of all or part of the remainder only upon a trial judge's comprehensive hearing (including participation by protesting members of the press and public), findings and rulings establishing the

necessity of the closure for the preservation of evidence for a just conviction. Opinion of the Supreme Judicial Court, Jurisdictional Statement at pages 32a-45a. Consequently the court viewed its treatment of the statute as a significant benefit to the press. "Although we do not squarely reach the constitutional questions raised today, we believe that the principles of construction we adopt bring us to a conclusion which approximates the results urged upon us by the Globe on constitutional grounds." Jurisdictional Statement at 34a.[2] Indeed the *Globe* now stands in a far better position as a result of the decision below, and no longer confronts the certain and recurrent prospect of complete exclusion from the whole of a trial of a sexual offense against a minor victim — the expectation which prompted the present lawsuit.

Second, the Supreme Judicial Court emphatically avoided consideration of the Federal constitutional issues pressed by the *Globe*. "Furthermore, instead of deciding the moot issues of the Globe's First and Sixth Amendment rights, we await the United States Supreme Court's decision in *Richmond Newspapers, Inc.* v. *Virginia, supra.*" Jurisdictional Statement at 33a. This caution arose from the volatility of the constitutional doctrine after the decision of *Gannett Co.* v. *DePasquale*, 443 U.S. 368 (1979), and during the pendency of *Richmond Newspapers, Inc.* v. *Commonwealth of Virginia*, 48 LW 5008 (July 2, 1980). See Jurisdictional Statement at 32a, final paragraph. The court's abstention from the constitutional questions carries several consequences for the vitality of the present appeal. An appeal under 28 U.S.C. § 1257(2) is premised upon a final adjudication of the Federal constitu-

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[2] In its accompanying footnote 5, the court observed that its opinion benefitted the newspaper as a matter of both substantive application of the statute and as a matter of procedural safeguards preceding closure. Jurisdictional Statement at 34a, n.5.

tional validity of a state statute.[3] No such final adjudication occurred in the present case. Because the Supreme Judicial Court was caught in the interim between *Gannett* and *Richmond Newspapers*, it could not reliably assess the constitutionality of G.L. c. 278, § 16A, and decided against the effort. The opinion of the court is rather an exercise of statutory construction in avoidance of constitutional questions during the pre-*Richmond* Federal law. The court never had the opportunity to judge § 16A in light of the First Amendment right of the press to attend criminal trials as declared in the *Richmond Newspapers* decision. And its choice to leave the constitutional questions in a condition of mootness evidenced a preference to decide such issues upon a post-*Richmond* record and doctrine. Neither the *Globe* nor the Superior Court can reasonably predict the Supreme Judicial Court's future application of *Richmond* to § 16A, either with regard to the mandatory closure of the testimony of a minor victim or with regard to a trial judge's discretionary closure of other parts of

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[3] In pertinent part, § 1257 provides:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> . . . . . .
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

"The first jurisdictional predicate of § 1257, in all its manifestations, is that there be a 'final' judgment or decree by the highest state court respecting the federal question." R.L. Stern & E. Gressman, *Supreme Court Practice*, 172-173 & n.12 (authorities collected) (5th ed. 1978).

such a trial for the necessary preservation of evidence.[4] Consequently the *Globe* cannot represent that it faces a recurrence of its experience in the present case. The controlling constitutional law and statutory application have now changed drastically since its exlusion from the entire underlying criminal trial in April and May of 1979.

Third, in the circumstances of changing doctrine, the Federal constitutional issues advanced by the *Globe* will come to the Supreme Court in a highly abstract or hypothetical form. A state trial court has not had a post-*Richmond* opportunity to create a record, especially findings weighing such state interests as the nature of the evidence and the possible harm to the juvenile against the constitutional entitlement of the public and press. Nor has an appellate court had a corresponding opportunity to pass upon the trial court's work product. In similar instances the Supreme Court has appropriately rejected an appeal because the Federal constitutional issues arrived before it without benefit of the state court's refinement and specification of the state law involved. *Rescue Army* v. *Municipal Court of Los Angeles*, 331 U.S. 549, 575 (1947). See also *Sanks* v. *Georgia*, 401 U.S. 144, 148-153 (1971); *United States* v. *Fruehauf*, 365 U.S. 146, 157 (1961). It should do the same here.[5]

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[4] Especially as to the discretionary exclusion of the press and public, each case will turn upon its own circumstances, particularly the quality of the trial judge's front-line findings in support of a closure ruling. As we discuss below, all Justices concurring in the judgment of the *Richmond Newspapers* decision acknowledged the existence of potential justifications for the closure of criminal trials in whole or part.

[5] One may add that the Supreme Judicial Court's acknowledgement of the appropriateness of review for moot cases "capable of repetition yet evading review" assures appellate consideration of an appropriate post-*Richmond* controversy upon its emergence from the Massachusetts trial courts. See Jurisdictional Statement at 26a, first full paragraph.

II. The Case Does Not Present a Substantial Federal Question.

The appellant asserts two Federal constitutional questions: (1) that the conferral of discretionary authority by § 16A upon trial judges to close all or parts of the trial of a sexual crime upon a minor in order to preserve evidence of a just conviction necessarily violates the press' First Amendment right of attendance (Jurisdictional Statement, 28-30); (2) and that the mandatory closure of the minor victim's testimony under § 16A also violates the press' First Amendment right of attendance (Jurisdictional Statement, 20-28).[6]

A. *A State Statute Authorizing a Trial Judge to Close All or Part of a Criminal Trial of a Sexual Offense Against a Minor, Upon a Comprehensive Hearing and Finding that Closure is Necessary to Preserve Evidence of a Just Conviction, Does Not Per Se Violate the First Amendment Right of the Press and Public to Attend Criminal Trials.*[7]

In the course of the *Richmond Newspapers* decision, 48 LW 5008 (July 2, 1980), all Justices acknowledging the First

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[6] The *Globe* adds similar theories under the Sixth Amendment (Jurisdictional Statement, 30-34). That line of argument appears far less relevant as a result of the First Amendment basis of the *Richmond Newspapers* decision. In response to the Sixth Amendment claims we point out (1) that a Sixth Amendment right of press attendance still has not received recognition; (2) and that, if such a right did gain acknowledgement, it would yield to state interests of the kind embodied in § 16A and explained more fully in the discussion below of the First Amendment claims.

[7] As to this issue in particular, the *Globe's* claim is moot. In the underlying criminal trial, it did not suffer from this application of the statute. The trial judge excluded the *Globe* be[illegible]e he regarded § 16A to be completely mandatory and to leave him no discretion in the matter (Jurisdictional Statement

Amendment right of the press to attend criminal trials recognized also that such a right was qualified and in appropriate circumstances might yield to countervailing justifications established by a trial judge in support of closure. See part D and footnote 18 of the plurality opinion of the Chief Justice, joined by Justices White and Stevens, 48 LW at 5015; part IV and footnotes 23 & 24 of opinion of Justice Brennan joined by Justice Marshall, 48 LW at 5019; concurring opinion of Justice Stewart, 48 LW at 5020 & n.5; concurring opinion of Justice Blackmun, 48 LW at 5021. The Justices cited such considerations as orderly proceedings, state secrets, the preservation of trade secrets, and the sensibilities of youthful prosecution witnesses as possible justifications for closure. And it emphasized the need for an informed and reasoned explanation of closure by the trial judge, in contrast with the summary exclusion of the press and public undertaken by the trial judge in the *Richmond Newspapers* instance.

As authoritatively construed by the Supreme Judicial Court, § 16A now imposes a procedure for an informed and reasoned closure decision on the part of a trial judge, and as substantive justification demands a showing of the "necessity" of closure for the preservation of evidence for a just conviction (Jurisdictional Statement at 43a-45a).

As a regimen of pre-closure procedure, the trial judge (1) must hold a hearing, (2) at which the party moving for closure must carry the burden of proof of its necessity, (3) at which the

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at 27a). The relaxed statutory construction of which the newspaper now complains arose only subsequently from the opinion of the Supreme Judicial Court (Jurisdictional Statement at 43a-45a). As to future application, the *Globe* cannot know or describe a constitutional injury until the circumstances of each case, especially the pre-closure findings of the trial judge, unfold. Thus it cannot reasonably predict repetitive constitutional harm of the kind alleged in this instance. In the text, we address its argument that even the relaxed interpretation is per se unconstitutional.

press and members of the public must have an opportunity to state objections, (4) and at the conclusion of which the trial judge must make findings of fact and appropriate rulings of law.

As the above cited comments of the Justices in *Richmond Newspapers* indicate, the need to preserve evidence of a just conviction is certainly a valid reason for closure. See also 6 J. Wigmore, *Evidence* § 1835 (Chadbourn Rev. 1976) cited in the plurality opinion, 48 LW 5015 n.18. Further, Mr. Justice Powell, who first espoused a press right of First Amendment attendance in *Gannett* v. *DePasquale*, but who did not participate in the *Richmond Newspapers* case stated on the earlier occasion, 443 U.S. 368, 398 (concurring opinion):

> [R]ight of access to courtrooms proceedings, of course, is not absolute. It is limited both by the constitutional right of defendants to a fair trial . . . *and by the needs of government to obtain just convictions and to preserve the confidentiality of sensitive information* and the identity of informants. . . . The task of determining the application of these limitations in each individual trial necessarily falls almost exclusively upon the trial court asked to exclude members of the press and public from the courtroom [citations omitted; emphasis added].

Analogously, Justice Blackmun who in *Gannett* contended strenuously for a Sixth Amendment press right of attendance acknowledged that such a right in appropriate circumstances may respect certain exceptions. See 443 U.S. 368, 439-440 (opinion concurring in part and dissenting in part, joined by Justices Brennan, White and Marshall). Even commentators who have urged recognition of the First Amendment right announced in *Richmond Newspapers* have conceded the need for

evidence as a potentially overriding state interest. See, *e.g.*, Note, *Trial Secrecy and the First Amendment Right of Public Access to Judicial Proceedings*, 91 Harv. L. Rev. 1899, 1914-1916, and 1918-1919 (1978).

> Before imposition of any secrecy devices will be allowed, a prosecutor will have to show not only that the particular witness cannot testify fully in public, but also that this difficulty represents a systematic problem so that refusing to allow closure will result in a pattern of repeated dismissals against the government. One possible example of such a systematic conflict is the need to secure testimony from the complainant in a rape case. If the prosecutor could show not only that the particular witness found it impossible to testify in public, but also that rape convictions generally would be highly difficult to obtain if the victim must testify in public, then a sufficient justification for overriding the first amendment right of public access would have been given (footnote omitted).

In the circumstances of the present case, then, the *Globe's* contention that under § 16A the very existence of a trial judge's sound discretion to close all or part of a trial in order to preserve necessary evidence constitutes a per se violation of a newspaper's First Amendment right of attendance fails to frame a serious or substantial Federal question. The *Globe* has yet to be subjected to such an exercise of discretion.[8] And when it does confront an adverse ruling, it may press its First Amendment claim according to the circumstances of a particular closure order and with the benefit of a full and specific record.

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[8] See n.7, *supra*.

B. *A State Statute Commanding a Trial Judge to Close the Testimony of a Minor Victim of a Sexual Offense to the Press and Public Does Not Violate the First Amendment Right of the Press and Public to Attend Criminal Trials.*

If, as the Justices explained in *Richmond Newspapers*, the First Amendment right of trial attendance will defer to certain overriding state interests, the privacy of minor or juvenile victims of sexual offenses such as rape qualifies as such a dominant interest. As the opinion of the Supreme Judicial Court elaborates, that interest as embodied in § 16A possesses at least two dimensions (Jurisdictional Statement at 37a, footnotes omitted): "the Legislature wished to shield certain victims of sex crimes from the difficult experience of testifying in public; and the Legislature joined this solicitude for victims with the broad, paternal protection afforded children generally." For the victim of sexual crime, especially of rape, the process of complaint, prosecution, and testimony is fraught with embarrassment, fear and trauma. For a victimized child, in particular, the experience may be frightening, stigmatizing, and psychologically damaging. These forces climax in the crucible of direct and cross examination at trial. In anticipation of that ordeal, § 16A enables a prosecutor to assure a young victim and her family that such a difficult experience will occur in a relatively private, it not protective, setting.

The fulfillment of one statutory purpose — the protection of the minor victim from the trauma of public testimony — leads to the achievement of a second statutory objective: the detection and prosecution of sexual offenses, such as rape and incest, upon children. As the Supreme Judicial Court observed (Jurisdictional Statement at 39a-40a), the prosecutor's assurance of some trial privacy will encourage communication and cooperation from victims and their families:

> Thus, the purpose of G.L. c. 278, § 16A, is to encourage young victims of sexual offenses to come forward; once they have come forward, the statute is designed to preserve their ability to testify by protecting them from undue psychological harm at trial. . . .
>
> In broader terms, the statute's purposes go beyond protection of juvenile privacy to encompass the State's interest in sound and orderly administration of justice; most important, the statute helps obtain just convictions for the types of crimes from which the victims had often suffered at the hands of the criminal justice system, while their assailants had often gone free (citations omitted).

The closure of the child's testimony does not trammel unnecessarily upon the right of the press to attend and to report. The statute does not bar the press from requesting a transcript of the testimony; it does not bar it from independent interviews with and reports from courtroom observers including family and friends of the victim and accused who have a "direct interest" in the trial and who therefore are admitted to it under § 16A; it does not bar the press from the entire remainder of the trial unless the judge finds and explains overriding justification for further exclusion; and, of course, it does not bar the press from post-trial contact with any of the participants in the proceeding. In short, the press need only temporarily report around the testimony of the child victim.

In sum, the state interests in the privacy of children victim to sexual crimes and in the reporting and prosecution of those crimes are sensitive and substantial; the sacrifice of the press interest is limited and reasonable. The competition of those interests does not pose a significant Federal question.

Conclusion.

Therefore the appellee Superior Court respectfully submits that the questions decisive of the present case are either moot or so insubstantial as not to warrant further argument; and it moves the court to dismiss this appeal from the judgment entered below by the Supreme Judicial Court of the Commonwealth of Massachusetts.

Respectfully submitted,

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